Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,

No. 82-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

–against–

SONY CORPORATION OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER SUPERSONIC ELECTRONICS CO.

I. SCOTT BASS
Counsel of Record for Petitioner
Supersonic Electronics Co.
747 Third Avenue
New York, New York 10017
(212) 751-9494

Of Counsel:
PROF. MARK F. POMERANTZ
MILTON A. BASS
JACOB LAUFER
IRVING L. WIESEN
Bass, Ullman & Lustigman

(13048)

TABLE OF CONTENTS

	PAGE
I. THE SECOND CIRCUIT'S HOLDING WITH REGARD TO CONSPIRACY IS IN CONFLICT WITH HOLDINGS OF OTHER CIRCUITS	1
II. THE COURT SHOULD RESOLVE THE "FIELD OF VISION" ISSUE, WHICH WAS RAISED AND RULED UPON BELOW	5
III. THE COURT OF APPEALS SHOULD HAVE REMANDED THE NEW TRIAL ISSUE FOR DETERMINATION BY THE DISTRICT COURT, IN THE FIRST INSTANCE	7
CONCLUSION	8

TABLE OF CITATIONS

	PAGE
Cases	
A.G. Rogers Co. v. *Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980)	2
Battle v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982)	2
In re Russell Stover Candies, Inc., Dkt. No. 9140, _FTC_, 7/1/82	4n
Modern Home Institute v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975)	2
Neely v. *Eby Construction Co.*, 386 U.S. 317 (1967)	7
Schwimmer v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982)	2n
Spray-Rite Service Corp. v. *Monsanto Corp.*, _F.2d_, 1982-2 Trade Cas. [CCH] ¶64,808 (7th Cir. 1982)	2n
Edward J. Sweeney & Sons v. *Texaco*, 637 F.2d 105 (3d Cir. 1980) *cert. denied*, 451 U.S. 911 (1981)	2
United States v. *Generes*, 504 U.S. 93, 113 (1972)	7
United States v. *Parke, Davis & Co.*, 362 U.S. 29 (1960)	4
Miscellaneous	
Bohling, *Franchise Termination Under the Sherman Act: Populism and Relational Power*, 53 Texas L. Rev. 1180, 1212 (1975)	1n
National Economic Research Associates, Inc., *A Statistical Analysis of Private Antitrust Litigation: Final Report* (Oct. 1979)	1n
Piraino, *Distributor Termination Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297 (1982)	1n,4n,6
Turner, *The Re-Definition of Agreements Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 688 (1962)	4n

No. 82-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MENDEL SCHWIMMER d/b/a
SUPERSONIC ELECTRONICS CO.,

Petitioner,

–against–

SONY CORPORATION OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THEUNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER SUPERSONIC ELECTRONICS CO.

I

THE SECOND CIRCUIT'S HOLDING WITH REGARD TO CONSPIRACY IS IN CONFLICT WITH HOLDINGS OF OTHER CIRCUITS

The conflict among the circuits with respect to defining "concerted action" in the realm of manufacturer-dealer anti-competitive conduct[1] is clear and indisputable:

[1] Anti-competitive conduct in these relationships has a pervasive effect throughout the entire economy. Studies also show that by far the largest segment of private antitrust litigation concerns disputes between manufacturers and dealers who distribute their products. *See, e.g.*, National Economic Research Associates, Inc., *A Statistical Analysis of Private Antitrust Litigation: Final Report*, prepared for ABA Section of Antitrust Law (Oct. 1979) at 31. *See also*, Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 Texas L. Rev. 1180, 1212 (1975); Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297 (1982).

The Second Circuit:

"Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them. *Modern Home Institute* v. *Hartford* [513 F.2d 102 (2d Cir. 1976)], *supra; Edward J. Sweeney & Sons* v. *Texaco* [637 F.2d 105 (3d Cir. 1980)], *supra; A.G. Rogers Co.* v. *Merck & Co.*, 498 F.Supp. 5 (E.D. Tenn. 1980)."[2]

The Seventh & Eighth Circuits:

"We believe, however, that proof of termination following competitor complaints is sufficient to support an inference of concerted action. In *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), the Eighth Circuit declined to follow *Sweeney* and held 'that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action.' *Id.* at 991 (emphasis in original). We agree." (footnotes omitted).[3]

Sony's denials to the contrary notwithstanding, it was undisputed below that Sony both promised, and thereafter attempted by various actions, to comply with requests and pressure from its distributors for curbs on transshipping and discounting.[4] Sony's President decided to "put the clamps on the transship-

---

[2] *Schwimmer* v. *Sony*, 677 F.2d 946, at 953. (2d Cir. 1982). The court held that proof of responsiveness was insufficient under section 1 because it allegedly had not "led to any agreement." [App. C, p. 6c, n.4).

[3] *Spray-Rite Service Corp.* v. *Monsanto Corp.*, _F.2d_, 1982-2 Trade Cas. [CCH] ¶64,808 at p. 71,984 (7th Cir. 1982). *See* App. C., p.15g.

[4] As the Second Circuit noted, "There was ample proof that Sonam's dealers complained about transshipping." 677 F.2d at 953. [App. C., p.15c.] As the Court also noted, Sony's Vice President "tried to assure [Kagan] we were working on programs to help him out at that meeting and that there were going to be changes in our program to help reduce the transshipping and price cutting. We were going to have some stability." 677 F.2d at 948. [App. C., p.5c.]

pers",[5] and Sony's Vice President admitted that Sony was "slowly putting the pressure on."[6] Sony began by withholding certain popular models of its products from the petitioner and from most of the transshipper accounts. When this method proved insufficient to halt transshipping and discounting in general, Sony executives tried "not legal means",[7] and imposed direct limitations on the credit line of petitioner.

Petitioner, one of Sony's largest transshippers, was further ordered outright to halt its sales to Florida,[8] with the warning that any continuing transshipments would cause Sony to "clamp him up completely."[9] When such action against *one* of its largest transshippers also did not sufficiently satisfy its complaining department stores, Sony's President expanded the effort to reach *nine* of its large transshippers and discounters. This was accomplished by way of selective enforcement against these nine of a previously unenforced provision of its advertising program. Finally, Sony restricted *all* transshippers by means of an outright prohibition on transshipping in its dealer contract. 677 F.2d at 947, n.1. [App.C., p.4c, n.1.]

Sony's argument that no responsive action was taken to satisfy their dealers' pressure is thus an erroneous interpretation of the Second Circuit's opinion.[10] The essence of the lower court's conflict with the Seventh and Eighth Circuits can be simply stated: In the Seventh and Eighth Circuits the *jury's* finding that Sony's anticompetitive actions were taken in response to the complaints would be sufficient to establish concerted action under §1 of the Sherman Act. In the Second Circuit, however,

---

[5] Tr.1194.

[6] Tr.1194.

[7] Tr.550.

[8] Tr.313.

[9] Tr.316.

[10] The District Court found: "Nor is this a case where the evidence is of complaints without proof of a response by the defendants." 1980-81 Trade Cas. [CCH] ¶63,766, at p. 78,088 (E.D.N.Y. 1981) [App. B, p. 3b]. The Court of Appeals did not dispute this holding.

such responsive action, although found by the jury,[11] was insufficient to establish a conspiracy.

The Second Circuit required "other evidence of a tacit understanding or agreement."[12] Yet, this Court has pointed out that "conspiracy" need not reflect the type of prior agreement which Judge Kearse requires. Rather, conspiracy may be formed by "pressure" by a manufacturer on its dealers, or vice versa, and acquiescence or response thereto. *See United States* v. *Parke, Davis Co.*, 362 U.S. 29 (1960).[13]

The Second Circuit, rejecting coerced compliance as a basis for conspiracy, therefore, believed that threats by department stores to stop buying Sony's products if Sony did not halt the transshipping, was inconsistent with the idea that the parties *agreed* on an approach to the problem. That some of the stores made good on their threats in the face of Sony's initial failures to solve the problem, should have confirmed the existence of a pressure-type conspiracy. Instead, the Second Circuit erroneously concluded that as a matter of law, "A & S's actions thereafter *negative any inference* that the general 'assur[ances]' attributed to Steiner signified, or led to, any agreement between Sonam and A & S on the elimination of transshipping." 677 F.2d at 948, n.4. (emphasis added). *See* App. C., p.6c.

---

[11] "The fact-finder may play a particularly important role in dealer termination cases, where anticompetitive purposes such as eliminating price-cutters may differ little from such possible procompetitive purposes as eliminating 'free riders,' and the 'evidence will often reflect what counsel advise businessmen their purpose should have been.' [citations omitted]. In such cases, the fact-finder should be allowed to weigh the conflicting inferences and the credibility of witnesses to determine the parties' actual intent." Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell Law Review 297, 314, n.80 (1982).

[12] 677 F.2d at 953. [App.C., p.18c.]

[13] For a comprehensive discussion of this issue, *see*, *In re Russell Stover Candies, Inc.*, Dkt. No. 9140, _FTC_, 7/1/82 ("The Court in *Parke, Davis*, in finding liability, reiterated that there was no requirement for a Sherman Act violation to find an express or implied agreement."). *See also*, Turner, *The Re-Definition of Agreements Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 688 (1962), which argues against excluding coerced compliance from the definition of conspiracy under the Sherman Act.

The position of the Seventh and Eighth Circuits which allows conspiracy to be inferred from actions found to be taken in response to complaints and dealer pressures is thus consistent with this Court's prior holdings. The Second Circuit's rule is inconsistent with such holdings and will allow manufacturers to take anti-competitive action in response to their dealers' demands without fear of antitrust liability. Certiorari should be granted to resolve this conflict between the Circuits and to set aside the Second Circuit's ruling.

II

THE COURT SHOULD RESOLVE THE "FIELD OF VISION" ISSUE, WHICH WAS RAISED AND RULED UPON BELOW

The Second Circuit applies the "all the evidence" approach to judgment n.o.v. motions and used it as a vehicle for setting aside the jury verdict in this case. This was possible only because this Court has not recently defined an appropriate evidentiary "field of vision" in resolution of the established conflict among the circuits.[14] The absence of such a definitive guideline by this Court has been acutely felt in the antitrust field. As recently noted by a leading commentator:

> "Such decisions are inconsistent with the courts' traditional deference to the fact-finder in antitrust actions. In other antitrust areas, the fact-finder has been allowed to infer the existence of an agreement from

---

[14] Respondent does not deny the conflict among the circuits concerning the evidentiary "field of vision" to be applied in ruling on j.n.o.v. motions. In an attempt to short circuit review of this issue, Sony advances the spurious argument that this issue was not raised below. Sony's brief in the Court of Appeals did indeed argue that the Second Circuit should accept the testimony of Sony's witnesses. Petitioner's brief, however, argued that the Court should not credit such testimony and should uphold the jury verdict based upon the evidence advanced by petitioner in support of its case. The trial court also took this position. [App. B, p.3b] The "field of vision" issue thus was raised below, and the Court of Appeals elected to accept Sony's position in direct opposition to the holding of the trial court.

> ambivalent conduct. Because direct evidence of an illegal agreement is rarely available in today's sophisticated business climate, courts have permitted the inference of a conspiracy from circumstantial evidence. . . . In several mixed termination cases, however, the terminated distributor has presented prima facie evidence of conspiracy, yet the courts have refused to allow the jury to decide the question of conspiracy." Piraino, *Distributor Termination Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 Cornell L. Rev. 297, 314-15 (1982).

Sony's attempt to defend the Second Circuit's holding on the ground that it ostensibly considered the evidence "in the light most favorable" to petitioner is misplaced. The Second Circuit explicitly considered all of the evidence "without weighing the credibility of the evidence," 677 F.2d at 952 [App. C, 15c], *i.e.*, all of Sony's conflicting testimony was placed on an equal footing with plaintiff's evidence. Viewing and accepting the testimony of Sony's hostile and interested witnesses "in the light most favorable" to petitioner is thus meaningless. The Court should have rejected any such adverse testimony on the ground that the jury was entitled to disbelieve it, as the District Court in fact held. [App. B, p.3b.][15]

Employing the "all the evidence" standard, the Second Circuit elevated Sony's testimony over plaintiff's evidence to "negative any inferences" from plaintiff's testimony.[16] Even in the absence of contrary Sony testimony, plaintiff's primary evidence was negatived because it was "not confirmed." *Id.*[17]

The Second Circuit has thus carried the "all the evidence" standard to an unprecedented extreme. This Court in the exer-

---

[15] *See also* Petition for Certiorari, p.23, n.39.

[16] 677 F.2d at 948, n.4. [App. C, p.6c]

[17] The Court noted that a Sony executive who might have testified in Sony's favor had died before the taking of any depositions. 677 F.2d at 948, n.4. [App. C, p.6c] This was used to explain why the Court rejected plaintiff's most important evidence, even in the absence of contradictory testimony.

cise of its supervisory jurisdiction should now intervene to define the evidentiary "field of vision" and, as urged by the commentators,[18] thereby end the uncertainty and potential for abuse inherent in the divergent standards currently being applied.

III

THE COURT OF APPEALS SHOULD HAVE REMANDED THE NEW TRIAL ISSUE FOR DETERMINATION BY THE DISTRICT COURT, IN THE FIRST INSTANCE

Respondent confirms the need for certiorari to clarify the meaning of *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967). Sony claims that *Neely* not only authorizes, but *encourages*, courts of appeal to resolve new trial requests as a matter of course. This view, adopted by the Second Circuit below, was *expressly rejected* by the author of the *Neely* opinion, Justice White, in his separate opinion in *U.S.* v. *Generes*, 504 U.S. 93, 113 (1972), which respondent wholly fails to mention.

In *Generes*, Justice White specifically pointed out that *Neely* was *not* intended to usurp the established role of the trial court in making new trial determinations and that evidentiary determinations precisely such as those at bar should be resubmitted for the trial court's initial consideration. Certiorari should, therefore, be granted on this issue as well.

---

[18] *See* Petition for Certiorari, pp.19-20, n.30; 9 C. Wright & A. Miller, Federal Practice and Procedure §2526 at 556, 559.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, we respectfully request that a writ of certiorari issue herein.

Respectfully submitted,

I. SCOTT BASS
Counsel of Record for Petitioner
747 Third Avenue
New York, New York 10017
(212) 751-9494

Of Counsel:
PROF. MARK F. POMERANTZ
MILTON A. BASS
JACOB LAUFER
IRVING L. WIESEN
Bass, Ullman & Lustigman